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Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 1282.

Ex Parte: In the matter of Lorenzo Snow,
Petitioner, Appellant.

Appeal from Order of Third District Court of Utah Territory, refusing application for writ of Habeas Corpus.

BRIEF FOR APPELLANT.

GEORGE TICKNOR CURTIS,
FRANKLIN S. RICHARDS,
For Petitioner.

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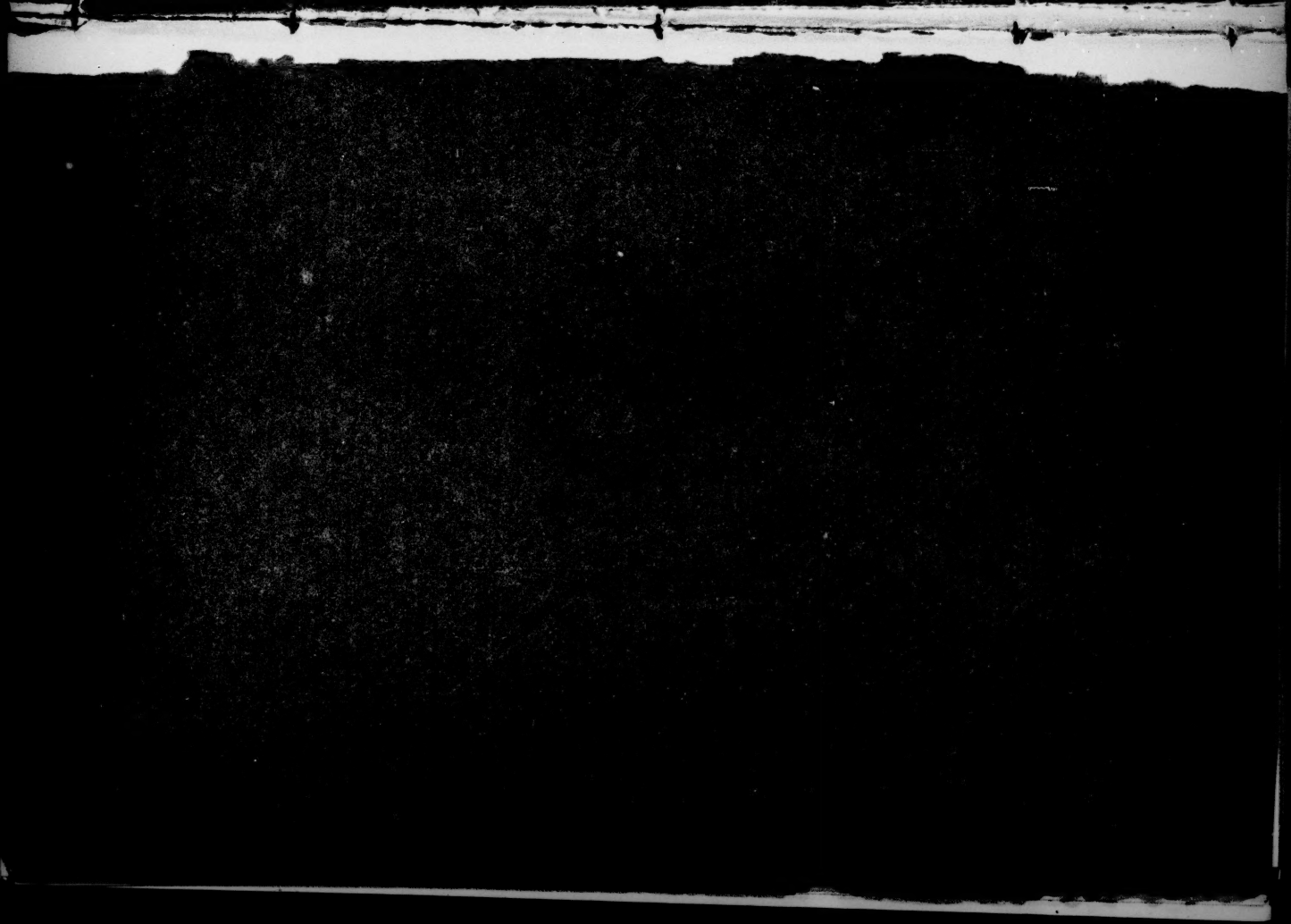

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EX PARTE: IN THE MATTER OF LORENZO SNOW, PETITIONER, APPELLANT.

BRIEF FOR THE APPELLANT.

This is an appeal from a final order of the District Court for the Third Judicial District of Utah Territory, refusing to issue a writ of *habeas corpus* applied for by the petitioner in his petition and exhibits thereto annexed, wherein he prayed to be discharged from custody under a judgment and sentences rendered and imposed by the District Court of the First Judicial District of Utah Territory, on the 16th day of January, 1886. The petition for the writ was presented on the 22d day of October, 1886, and the order refusing to issue it was made and entered October 23d, 1886. The appeal to this court was allowed by the District Court on the 25th of October, 1886, pursuant to section 9 of the Organic Act of Utah, and section 1909 of the U. S. Revised Statutes.

STATEMENT OF THE CASE.

The petitioner, Lorenzo Snow, on separate trials, was convicted in the District Court of the First Judicial District of Utah Territory on three indictments for unlawful cohabitation, and the judgment, in each case for the highest

penalty imposed by the statute, was affirmed by the Supreme Court of the Territory, and the petitioner was and is now imprisoned in execution of the same. The indictments were all found by the same grand jury, at the same term, and on the same evidence. They were found under section 3 of chapter 47 of an act of Congress approved March 22d, 1882, entitled "An act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes;" which section reads as follows:

> SEC. 3. That if any male person, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court.

One indictment charged cohabitation with seven women in 1883; another charged cohabitation with the same women in 1884, and the third charged cohabitation with the same women during the first eleven months of 1885. The trials occurred in the inverse order of the times covered by the indictments, commencing with the indictment for eleven months of the year 1885.

The indictment in the case first tried charged that the defendant, *on the first day of January, in the year* 1885, *at the County of Box Elder, in the said District, and on divers other days and times thereafter, and continuously between the said first day of January,* 1885, *and the first day of December,* 1885, did then and there unlawfully live and cohabit with more than one woman, to wit, with Adeline Snow, Sarah Snow, Harriet Snow, Eleanor Snow, Mary H. Snow, Phœbe W. Snow, and Minnie Jenson Snow; *and during all the periods aforesaid did unlawfully claim, live, and cohabit with all of said women as his wives,* against the form of the statute of said United States in such case made

and provided, and against the peace and dignity of the same.

The indictment in the second case tried charged the offence with the same women, at the same place, in the same language, as an offence covering the period from January 1, 1884, to December 31, 1884.

The indictment in the third case tried charged the same offence, with the same women, in the same language, as an offence covering the period from January 1, 1883, to December 31, 1883.

The three indictments were all found upon the testimony of the same witnesses, before the same grand jury, on one oath and one examination as to the alleged offence, during the entire time embraced by all three of said indictments, and without any discrimination between the different periods covered by the respective indictments, in respect to the conduct of the defendant supposed to constitute the unlawful cohabitation.

After conviction in the case first tried, which was had December 31, 1885, the defendant was put upon trial on the indictment which charged the offence for the period from January 1, 1884, to December 31, 1884. The defendant then interposed a plea of former conviction for the period from January 1, 1885, to December 31, 1885. This plea, after argument, was overruled by the court; the defendant pleaded not guilty, and was tried and convicted.

The defendant was then put upon trial on the indictment which charged the offence for the period from January 1, 1883, to December 31, 1883. To this indictment he interposed a plea of the two former convictions. This plea, after argument, was overruled by the court; the defendant pleaded not guilty, and was tried and convicted.

The defendant was brought up for sentence under all three of the said convictions, at the same time, and the

record remaining in the trial court shows that its judgment was rendered on all three of them as one judgment, embracing the three several convictions, imposing for each period the highest penalty of both fine and imprisonment allowed by law, and making the second term of imprisonment commence at the expiration of the first term, and the third term of imprisonment commence at the expiration of the second. In each case the sentence imposed the full penalty of $300 fine and six months' imprisonment, and the costs of prosecution, and committed the defendant until the fines and costs should be fully paid. The commitment was to the penitentiary, the warden of which was ordered to keep and imprison the defendant for the periods in the judgment ordered and specified.

When the petition for the *habeas corpus* was presented to the court below, the defendant was serving out the second term of imprisonment; and it was to test the legality of his sentence as to such second term, and as to the third term, that the writ was applied for. If the judgment and sentence for the second term of imprisonment, and the fine imposed, were unlawful, by reason of the conviction for the period for which the defendant was first tried and convicted, and if the judgment and sentence for the third term, and the fine imposed, were unlawful because of the two former convictions, the defendant was entitled to the writ and to be discharged from further custody.

When a prisoner is held under a judgment of a court made without authority of law, the proper tribunal will, upon habeas corpus, *look into the record so far as to ascertain that fact, and if it is found to be so, will discharge the prisoner.*

Ex-parte Lange, 18 Wall., 163, 178.

Ex-parte Milligan, 4 Wall., 2, 131.

Tweed *v.* Liscomb, 60 N. Y., 559, and cases there cited.

Lamphere's case, S. C. Mich., 27 N. W. Rep., 882.
Church on *Habeas Corpus*, Secs. 348, 362, 363

QUESTIONS ARISING ON THIS APPEAL.

I.

The refusal of the court below to issue the writ was the same in legal effect as the refusal to discharge the petitioner would have been if the writ had been issued and action had been had on it. The petition and exhibits brought before the court below the entire state of the record in the three cases, from the finding of the indictments to the final judgment; and everything was thus before the court below that could have been brought before it if the writ had issued and the warden of the prison had made return of the authority by which he held the petitioner. The decision of the court below on the petition shows that the court fully considered the application, petition, and exhibits, and found that the facts alleged and shown by the petition and exhibits were insufficient to authorize the issuance of the writ, and, moreover, that the court was of opinion from the allegations and facts stated in the petition and exhibits that, if the writ were granted and a hearing given the petitioner, he could not be discharged from custody. The application was therefore refused, and to this refusal the petitioner duly excepted.

In all courts having the power to issue writs of *habeas corpus* to inquire into a cause of commitment and imprisonment, a refusal to issue the writ is of the same legal effect and the same error as if the writ had been issued, and upon its return, the petitioner had been remanded, when the petition shows a legal cause for a discharge from custody. It is optional with the court to which application for the

writ is made, to hear the case on the petition before the writ issues, or to issue it and hear the case on the return. In this case, the court treated the petition and exhibits as sufficient to warrant a refusal of the writ, because, in the opinion of the court, if the writ were issued and the case heard on the return, the petitioner could not be discharged from custody. The identical question of law was decided by the refusal to issue the writ, that would have had to be decided if it had issued and been returned.

The following case sustains the position above taken:

In *ex parte* Milligan (71 U. S., 110–111), Mr. Justice Davis, delivering the opinion of court, said:

> It is true that it is usual for a court, on application for a writ of *habeas corpus*, to issue the writ, and, on the return, to dispose of the case; but the court can elect to waive the issuing of the writ, and consider whether upon the facts presented in the petition, the prisoner if brought before it could be discharged. One of the very points on which the case of Tobias Watkins, reported in 3 Peters, turned, was, whether if the writ was issued, the petitioner would be remanded upon the case which he had made.
>
> The Chief-Justice, in delivering the opinion of the court, said: "The cause of imprisonment is shown as fully by the petitioner as it could appear on the return of the writ, consequently the writ ought not to be awarded if the court is satisfied that the prisoner would be remanded to prison."
>
> The judges of the Circuit Court of Indiana were, therefore, warranted by an express decision of this court, in refusing the writ, if satisfied that the prisoner on his own showing was rightfully detained.

The *Habeas Corpus* act of Utah also contemplates that the writ in such cases may be refused. It reads as follows:

> SEC. 1. Be it enacted by the Governor and Legislative Assembly of the Territory of Utah: That the petition for a writ of *habeas corpus* must be in writing, and be sworn to and signed by the prisoner, or some person on his, her, or their behalf, setting forth the facts concerning his, her, or their imprisonment, and in whose custody he, she, or they are detained, and shall be accompanied by a copy of the warrant or warrants of commitment, or an affidavit that the said copy had been demanded of the person or persons in whose custody the prisoner or prisoners are detained, and by him or them refused or neglected to be given.
>
> SEC. 2. Upon the presentation of the foregoing petition to any court having jurisdiction, the writ of *habeas corpus* shall be awarded, unless it shall appear from the petition itself, or the documents annexed, or the showing of the petitioner, the party so applying would not be entitled to any relief.
>
> Comp. Laws of Utah, 370–71.

II.

The appeal to this court was taken under section 9 of the Organic Act of Utah, approved September 9, 1850, and section 1909 of the Revised Statutes of the United States, which provide as follows:

SECTION 9. *And be it further enacted*, That the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. * * * A writ of error or appeal, shall also be allowed to the Supreme Court of the United States, from the decisions of the said supreme court created by this act, or of any judge thereof, upon any writ of *habeas corpus* involving the question of personal freedom; * * * and the said supreme and district courts of the said Territory, and the respective judges thereof, shall and may grant writs of *habeas corpus* in all cases in which the same are granted by the judges of the United States in the District of Columbia.

§ 1909. * * * A writ of error or appeal shall be allowed to the Su-[preme Court of the United States from the *decisions* of the supreme courts of Territories] created by this title, or of any judge thereof, or of the district courts [of Territories] created by this title, or of any judge thereof, *upon writs of* habeas corpus *involving the question of personal freedom.*

By section 1907 of the Revised Statutes of the United States, re-enacting the Organic Act of September 9, 1850, the judicial power of Utah Territory is vested in a supreme court, district courts, probate courts, and justices of the peace.

By section 1910 of the Revised Statutes, each of the district courts of the Territories mentioned in the preceding section shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States, as is vested in the circuit and district courts of the United States.

Consistently with what was laid down by this court in Milligan's case, section 1909 of the Revised Statutes, must be held as providing for an appeal to this court where the writ has been refused on the petitioner's own showing, as well as where the writ has been issued and returned, and the prisoner, after a hearing, has been remanded to the custody from which he asked to be relieved. If the section

were not so construed, the inferior court could prevent an appeal to this court by simply refusing to issue the writ. This is not the intention of the section. There is just as much a "decision on a writ of *habeas corpus* involving the question of personal liberty," where the court refuses to issue the writ, because the petitioner, on his own showing, could not, in the opinion of the court, be discharged, as there is where the writ has been issued, returned, and, on a hearing, the petitioner has been remanded.

III.

The question presented by this appeal is not on the word "cohabit," in reference to the character and kind of intercourse supposed to constitute the offence, but it is on the meaning of the word "cohabit," in reference to the continuity or duration of that intercourse. What constitutes the unlawful cohabitation denounced by the statute was one of the questions argued in this court at the last term, in the three cases of Lorenzo Snow, plaintiff in error, *v.* The United States, defendant in error, numbers 1277, 1278, 1279, which, after argument, were dismissed for want of jurisdiction. (Snow *v.* United States, 118 U. S., 346). Those writs of error brought up to this court the entire records of the three trials in the First Judicial District Court of Utah, from the finding of the indictments to the final judgment and sentence; and the evidence adduced by the prosecution made clear the character and kind of association or intercourse of which the defendant was convicted. The dismissal of those writs of error for want of jurisdiction left the judgment of the First District Court in operation, and left the rulings of that court, as to what constitutes unlawful cohabitation in the state of facts shown on those trials, unreversed and unaffected. On the present appeal the record shows only that the appellant was charged

in three several indictments with the unlawful cohabitation punished by the 3d section of the act, was separately tried on the several indictments, and was convicted of each of the offences charged by a verdict of "guilty," as charged in the indictment.

What has to be done, therefore, on the present appeal, is to determine the meaning of the word "cohabit," in the section which provides that "If any male person &c., hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished," &c., in reference to the continuance and duration of the offence? As the unlawful cohabitation was charged in all of the indictments to have been with the same women, seven in number; as the indictments were all found by the same grand jury, at the same time, and on the testimony of the same witnesses, covering the whole period of time from January 1, 1883, to December 1, 1885, and differing only in respect to the several periods of time covered by the respective indictments, what is now to be determined by this court, on the present appeal, is whether that continuous cohabitation constituted one offence or three, and whether the prosecutor was at liberty, on his own option, to divide up the entire period of time into separate periods, presenting to the grand jury a separate indictment charging the offence as a separate one, committed during that period; to examine the same witnesses at one and the same time, in reference to the whole period from January 1, 1883, to December 1, 1885; to put the defendant on trial on each indictment in the reverse order of the chronological separate periods of time; to convict him of the offence for each of said minor periods; to claim and procure one judgment reciting that the defendant had been duly convicted of the crime of unlawful cohabitation; and therein, and in the one judgment, to have the defendant sentenced to

the maximum term of imprisonment and to pay the maximum fine under each of the three convictions, with the costs of prosecution, the successive terms of imprisonment being dovetailed on to each other, so that when one term expired the other was instantly to commence, thus constituting a continuing imprisonment of eighteen months, with fines aggregating nine hundred dollars, and the costs of prosecution in each case, the commitment to the penitentiary directing the warden to keep and imprison the defendant for the periods in the judgment ordered and specified.

Whether we take the meaning of the words "hereafter cohabits," as describing an offence which is committed by one or another kind of intercourse or association with two or more women, is immaterial on this appeal, to a certain extent, because the question here is, whether, whatever was the character of the intercourse or association, the indictments, convictions, judgment, sentences, and commitment could lawfully take place as we find them in the record. For example, if the intercourse, or association shown by the testimony of the witnesses on the several trials, was sexual cohabitation with seven women, the legality of the judgment, sentences, and commitment of the defendant would be the question to be decided here. So, too, if the intercourse and association with the seven women was of a different character, the question here would be the same, namely, the legality of the judgment, sentences, and commitment.

Still, the essential statutory meaning of the words "hereafter cohabits" must be determined on this record, because the question here is on the arbitrary division of a period of time commencing after the statute went into operation (March 22, 1882), on the 1st day of January, 1883, and ending December 1, 1885, into three separate periods of time, making three completed and separate offences. The

statute is highly penal. It imposes fine or imprisonment, either or both, in the discretion of the court, making the offence a misdemeanor; and it is apparent from the following considerations that it was the intent of the statute not to inflict the full severity of punishment, unless there should be a commission of a completed offence.

Where there had been a completed offence such as the statute meant to punish, the amount of the punishment, to the prescribed extent, would be in the discretion of the court.

1. The offence was an entirely new one. It was created in a statute which was designed to put an end to the practice of plural marriages in the Territories of the United States, or the marriage of one man with more than one woman, a state of the marriage relation known as polygamy. The statute recognizes the fact—of which this court would also take judicial notice—that such marriages have, in this country, before its passage, been peculiar to a sect of religionists called "Mormons," and that they have been solemnized according to the ceremonies of that sect. It is judicially known to this court that no other religious sect or denomination in this country solemnizes such marriages by its marriage ceremonies; and if this were not judicially known, this statute makes known to the court that it deals especially with Mormon marriages, in cases where they have been solemnized between one man and more than one woman. The statute known as "the Edmunds act" (approved March 22, 1882) is an amendment of section 5352 of the Revised Statutes, which is a re-enactment of the anti-polygamy act of July 1, 1862. Section 5352 of the Revised Statutes, like the act of 1862, declared that "every person having a husband or wife living, who marries another, whether married or single, in a Territory of the United States, &c., is guilty of *bigamy*;" and it in

flicts a fine of not more than $500, and imprisonment for a term of not more than five years. The 1st section of the amending act of March 22, 1882, defined *polygamy* in the Territories as the marriage of any person who, having a husband or wife living, thereafter marries another, whether married or single; and also defined it as the marriage of any man who thereafter, simultaneously or on the same day, marries more than one woman. The punishment inflicted for polygamy, as thus defined, is a fine of not more than $500, and imprisonment for a term of not more than five years. Taken together, the amending act of March 22, 1882, and section 5352 of the Revised Statutes, make *polygamy bigamy*, and inflicts for each of these offences the same penalty. But section 3 of the amending act, which was "for other purposes," as well as in reference to bigamy, makes a new and separate offence, hitherto unknown to the criminal code of the United States, and denominated *cohabitation with more than one woman*. It makes this offence a misdemeanor, when committed after the passage of the act, and punishes it by a fine of not more than $300, or by imprisonment for not more than six months, or by both, in the discretion of the court.

2. It could not have been the intent of this section, in regard to this entirely new and separate offence, to give the court discretionary power to inflict, in any case, the maximum penalty of both fine and imprisonment to the utmost extent limited, unless there should be an offence commencing at some time after the section took effect, and terminating at such time as an indictment might be found, or when the party accused voluntarily terminates the unlawful association or intercourse which is supposed to constitute *cohabitation*. "Cohabit," *ex vi termini*, necessarily implies a living or dwelling together in some kind of association. It imports as habit, continuity; and it cannot be held to con-

sist in one act of intercourse, whether sexual or of some other character, or to have been committed without some lapse of time and a continuing course of conduct between a man and two or more women. Some lapse of time is a necessary element in this offence, and another necessary element is a course of conduct continuing for a greater or a less length of time between a man and two or more women, whether the conduct consists of illicit sexual intercourse or any other kind of association. The language of the section is, "If any male person *hereafter cohabits*," and unless a definition is given to a word in the language which has a perfectly well recognized meaning, absolutely and entirely at variance with that common meaning, there must be a living or dwelling together, a continuous habit, in whatever kind of association or intercourse is held to constitute the offence which is made a misdemeanor and punished by a heavy penalty. It is true that the offence might be proved by showing certain acts occurring at longer or shorter intervals, but from those acts the inference must be capable of being drawn, that taken together they constitute the offence of cohabitation, because they amount to a habit of association, and no such inference can be drawn from a single isolated act, whatever it might be.

3. The essential meaning of the word "cohabits," in this statute, may be illustrated by contrasting it with a hypothetical provision of criminal law. Suppose that the section read: "That if any male person, in a Territory, &c., hereafter *carnally knows* more than one woman, or hereafter takes a meal at the same table with more than one woman, or hereafter contributes any money or other thing of value to the support of more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished," &c. Under such a statute, proof of the single act, whatever it might be, would be proof of the of-

fence; time, or repetition of the act, would not be an element in the offence; and the offender could be separately indicted and separately punished for the offence, just as many times as the single act had been committed. But the words "hereafter *cohabits*" necessarily excludes a single act from constituting the offence, and necessarily includes the elements of time, of a continuous course of conduct, amounting to a habit of living or dwelling or associating together for some period, longer or shorter.

4. When a grand jury have before them a man held to answer for this offence of unlawful cohabitation with more than one woman, they are, of course, confined to the inquiry of what his conduct has been since the statute went into operation, and during the period prescribed by the statute of limitations. If the witnesses summoned before the grand jury to make out the case are examined and testify to one period of time, commencing, as in this case, on January 1, 1883, and extending to December 1, 1885, a period of two years and eleven months, and their evidence tends to show that the accused, during all that time, associated with certain women in a way that the District Attorney claims to constitute unlawful cohabitation, there is *prima facie* proof of one offence, continuing from January 1, 1883, to December 1, 1885. If, after such an examination of witnesses for the prosecution, the grand jury, at the instance of the District Attorney, or on their own motion, break up this period of time into lesser periods, and, instead of finding one bill for one entire offence committed during the period testified to by the witnesses, they find separate bills for lesser periods, charging the offence as committed for each period so arbitrarily divided, they, in fact, legislate something which the statute does not enact. For it is undeniable that this statute did not mean to punish a man for separate and several offences, committed

at different periods of time, when he has committed but one offence, because there has been no break in the unlawful intercourse or association; no discontinuance of the unlawful relation, followed by a resumption of it, and when the division into separate periods and separate offences is reckoned only by an arbitrary segregation and put into several indictments. The consequence of such a course of administering this statute is, necessarily, that when the accused has been convicted under each indictment he stands exposed to the infliction of the maximum penalty for several offences of precisely the same character, when the statute intended to punish him for only one offence, under circumstances which show clearly that he has committed but one. When we follow this mode of examining the witnesses for the prosecution for the purpose of informing the grand jury concerning the conduct of the accused, and follow the mode of charging separate offences for separate periods of time, and in several indictments, into the one judgment that was entered in these three cases, it becomes apparent that this course of practice was resorted to for the purpose of accumulating upon the accused a weight of punishment for which there is no justification in the statute. The same course of practice, with just as much reason, might have been carried to the extent of charging a separate offence for each month in the whole period, or for each day, thus laying the foundation for an accumulation of punishment that appalls by its magnitude. And when we recollect that the accused, when brought up for sentence, stands before a court having discretionary power to inflict the maximum of both fine and imprisonment for the offence of which he has been convicted, the dangerous consequences of such a practice become glaringly conspicuous.

We now advance to an examination of the judgment and sentences rendered on these three indictments. The judg-

ment was evidently drawn up with a purpose to carry out and effectuate the objects aimed at by the separate indictments. It can find no justification in criminal procedure in courts conducted according to the course of our courts of criminal jurisdiction.

It matters not what the general power and jurisdiction of a court may be, if it act without authority in the particular case its judgments and orders are mere nullities; or if it render a judgment which it had a right to render, and something more, the excess is void.

Ex-parte Lange, 18 Wall., 163, 177, 178.

Bigelow *v.* Forrest, 9 Wall., 339.

Tweed *v.* Liscomb, 60 N. Y., 559, 568, 572, 579, 588.

Crepps *v.* Durden, 2 Cowp., 640.

Church on Habeas Corpus, Sec. 362.

The judgment begins with a recital that the defendant has been "duly convicted in this court of the crime of unlawful cohabitation." Without inquiring whether a statutory "misdemeanor" is rightly described as a "crime," it is important to notice that this recital is not that Lorenzo Snow has been thrice convicted of the offence of unlawful cohabitation, or convicted of three crimes or misdemeanors, but it is that he has been convicted of one crime. This mode of commencing the record was manifestly resorted to in order to lay the foundation for the plan of uniting in this one judgment sentences under each of the three indictments. The judge who pronounced and signed this judgment was the judge who tried the cases on all the indictments. He knew, judicially and personally, all the evidence introduced by the prosecution on each trial, and he therefore knew all the mitigating circumstances that may have existed for the imposition of a lesser penalty in the two cases last tried than might be called for in the case first tried. But he left no opportunity for a consideration of those mitigating circumstances.

Exercising his discretion, in respect to each case, just as he would have exercised it if there had been but one case, he pronounced a judgment which first sentenced the defendant to the maximum penalty of the statute in both fine and imprisonment, and which then proceeded, *uno flatu*, to sentence the defendant to the same maximum penalty in each of the two other cases, and made each of the last two terms of imprisonment commence *eo instanti* with the expiration of the preceding one, thus inflicting 18 months of imprisonment, and $900 fine, for an offence that was never by any evidence separated into distinct offences, and only became so separated by an arbitrary and improper practice of charging the offence.

It may be confidently denied that the statute ever intended to confer on the trial court any such discretionary power over the punishment as was exercised in these cases. The discretion that was vested in the court was a discretion to determine when a conviction had made it certain that the defendant had, since the statute took effect, "cohabited with more than one woman," whether he should be punished by fine or imprisonment, or by both; and to what amount of either up to a certain maximum. But it was not a discretion to take three several convictions, on three several indictments, and inflict in one judgment the maximum of fine and imprisonment in each case, when the prosecution did not show any break whatever in the conduct of the defendant, and when the very form of the indictments, in charging the offence in each case, connected the conduct of the defendant with the same women as a continuous conduct throughout the whole period from January 1, 1883, to December 1, 1885.

IV.

The judgment is void as to the penalties imposed on the second and third convictions, because it is too uncertain and indefinite as to the time of commencement of the second and third terms of imprisonment to be upheld.

A judicial sentence must always impose a definite punishment, within the limits prescribed by law, and must determine with certainty when it shall commence. No meaning can be given to a sentence but what its language imports. Nothing can be taken for granted and nothing will be implied. What it says alone must determine its meaning.

The Legislative Assembly of the Territory of Utah, by an act approved February 18, 1880, provided as follows:

AN ACT allowing Reward to Convicts and Commuting their term of Sentence for Meritorious Conduct.

SEC. 1. *Be it enacted by the Governor and Legislative Assembly of the Territory of Utah:* That in order that good behavior on the part of convicts may be properly rewarded, the warden of the penitentiary in this Territory shall keep a correct daily record of the conduct of each convict imprisoned therein, showing his faithful observance of the rules of discipline of said penitentiary, and general conduct therein, specifying in such record each infraction of the rules of discipline; and, at the end of each month of imprisonment, enter briefly on such record a certificate of good conduct for the past month in favor of each convict against whom no infraction of the rules of discipline is entered during said month; and on the first day of each month announce such result to the convicts, and each convict therein imprisoned, who is sentenced for a definite time, if for 3 months and less than life, shall be entitled to diminish the period of his sentence and be restored to his citizenship, as hereinafter provided.

SEC. 2. For each month of the imprisonment of the convict, commencing on the first day after his arrival at the penitentiary, during which he has not been guilty of a violation or infraction of the rules of discipline thereof, he shall be allowed a deduction of five days from the period of his sentence. At any time after a convict has passed one full year of his sentence, in which he has not been guilty of a violation of any of the rules of discipline of the penitentiary, the deduction shall be seven days from the period of his sentence for each month. After he shall have passed two full years as above, the deduction in his sentence shall be nine days for each month. After he shall have passed three or more full years as above, the deduction shall be ten days for each month.

SEC. 3. The warden of the penitentiary is hereby authorized, empowered, and required to grant and enter up in his record, in favor of such convicts as he may deem worthy for meritorious conduct and observance of the rules of discipline during the twelve months prior to the passage of this act, a credit not exceeding sixty days, to be deducted from the term of their imprisonment.

SEC. 4. For every violation of the rules of discipline, the convict shall not only forfeit all the time gained for the month in which the delinquency occurs, but, according to the aggravated nature or frequency of his offences, the warden, or other officer in charge, may deduct a portion or all of his previously earned time, and such convict shall not be entitled to any dimunition of his term of imprisonment on account of his previously gained time: *Provided*, That any convict feeling himself aggrieved and unjustly deprived of such earned or gained time, may appeal in writing to the Governor of the Territory, stating his reasons or evidence in support thereof, and the said Governor may have such time credited back to said convict if satisfied that he has been unjustly deprived of the same.

SEC. 5. When the full term of imprisonment for which any convict has been sentenced by the court shall be diminished by his good conduct, under the provisions of this act, so that the term of imprisonment has thereby expired, the warden, or other officer in charge of the penitentiary, shall immediately furnish the Governor a certificate stating the length of time his term of imprisonment has been so diminished by good conduct, and furnish a copy of such certificate to the prisoner benefitted thereby, which shall entitle him to a pardon and a restoration to his citizenship.

SEC. 6. At the end of every three months, the warden, or other officer in charge of the penitentiary, shall report to the Governor of the Territory the names of all persons who may have become entitled to the benefits of this act, with the amount of total credits to the date of such report, the term of their sentences, the date of imprisonment, and the date when their term of imprisonment would expire by the diminution and commutation provided for in this act.

The provisions of this territorial statute were in force when the petitioner was sentenced, and, under the U. S. Revised Statutes, he was entitled to the benefit arising from it. By good conduct he could reduce a six-months' term of imprisonment to about five months. The judgment provides that the defendant shall be imprisoned on the first sentence for the period of six months, and that the second term shall commence at the expiration of that sentence; it then provides that the third term shall commence at the expiration of the second sentence. What is the meaning of this language? If it means that, regardless of the statute providing credits for good behavior, the prisoner shall serve full six months on the first sentence, then it is in excess of the law; for under certain conditions the defendant can satisfy a six months' term in about five months. If it means that the first term shall be subject to be shortened by credits for good behavior, then it should

have said that the imprisonment on the second sentence shall commence at the expiration, *or sooner termination*, of the first term, &c. These additional words would have tended to make the judgment more definite in this particular, but even then it would have been impossible to tell from it whether the second term of imprisonment would commence at the expiration of six months or of five months from the time of the prisoner's incarceration, because it would depend entirely upon what, if any, credits he might receive from the prison authorities. Such a judgment is too uncertain and indefinite to be upheld, and the second and third sentences must fall, inasmuch as the times for their beginning are "not made to depend on the action of the law, or of any court, and it rests with the prison authorities to determine how much, if any time, is to be allowed for good conduct."

Lamphere's case, S. C. Mich., 27 N. W. Rep., 882, and authorities there cited.

Miller *v.* Allen, 11 Ind., 389.

Baker *v.* State, 11 Tex. App., 262.

V.

The cohabitation having been continuous, covering every day of the entire time charged in the three indictments, from January 1st, 1883, to December 1st, 1885, and having been with the same women and at the same place, was one continuous indivisible transaction, and could constitute but one offence. As we have already shown, cohabitation consists of a continuing act or series of acts, all amounting to the one thing, and it is necessarily the same offence until the continuity is broken by a prosecution, or by some marked act of the parties, or by cessation. So far as we have been able to ascertain from the books, this is the

first time that an attempt has ever been made to segregate or divide a continuous cohabitation into several offences, a fact which is itself significant, and will doubtless have weight with the court in determining this important question—whether the prosecutor and grand jury, by this novel procedure, can enlarge the punishment prescribed by law for this offence from six months imprisonment to incarceration for life, and from $300 fine to $300,000 or more?

But while we find no case directly in point—no instance where a continuous cohabitation has been segregated, the principle involved has been applied in numerous adjudicated cases which are analogous to this, and the reasoning of the courts in those cases seems so cogent as to leave beyond question the soundness of our position, that no such segregation can take place. Mr. Wharton, in his excellent work on Criminal Law, vol. 1, section 931, (9th edition), treats upon the subject of continuous offences in the following language:

> The first question that arises, when two or more articles are taken, is, is such taking continuous, so as to form part of one transaction, and to be necessarily indictable as such? And the answer is, if the transaction is set in motion by a single impulse, and operated upon by a single unintermittent force, it forms a continuous act, and hence must be treated as one larceny, not susceptible of being broken up in a series of offences, no matter how long a time the act may occupy. So has it been decided in reference to gas feloniously drawn, during a long space of time, from a main pipe, by means of a fraudulent pipe; and so it is where a series of articles are removed by a prisoner, a few minutes apart, evidently in execution of a general fraudulent plan. And when a particular shaft of coal is fraudulently opened and quarried, in pursuance of a continuous design, by a series of innocent agents, for several years, the transaction, if there be one tapping or orifice of the vein, is single, and to be indicted as such. Such is also the rule of the modern Roman law with regard to the subtraction of wine from vats by a tube fraudulently applied. No matter how long the suction lasts, or how much wine is removed, the transaction is single as long as it rests on the original attachment of the tube.
>
> If this reasoning be correct, there can be, when there is such continuousness, but a single prosecution; and one prosecution for a section or part of the things taken absorbs the offence. If the prosecutor elects to take such a section, he cannot spin out the prosecution into a series of cases commensurate in number with the particles of the mass taken. Such is the reasoning by which eminent German jurists have reached the conclusion that for a continuous offence there can be but a single prosecution,

unless some extrinsic force necessitates the breaking of the offence into fragments. The same view is practically accepted in England and the United States. But if broken up, as is stated by extrinsic action, then separate indictments are necessary. This perhaps occurs when articles of different owners are taken by a continuous act; and certainly when the continuous act spreads over two or more distinct jurisdictions, or is broken by the intervention of other occupations.

See also cases cited by Mr. Wharton in his notes to this section.

The following English cases seem to have been decided upon the very principle involved here: Reg. *v.* John Firth (L. R., 1 C. C., 172). In that case the defendant was indicted for stealing one thousand feet of gas on a particular day. The evidence showed that, during several years, by means of a secret junction-pipe connecting with the main of a gas company, a mill under the defendant's management was supplied with gas, which was burned each day and turned off at night, but did not pass through the meter, and was consumed without being paid for. The entire evidence as to the whole period was admitted, and it was contended that each day's taking of the gas was a distinct act of larceny, committed when the gas was turned on. The court in its opinion said:

The real question in this case is, whether there was a series of takings during the whole number of years during which the gas was used, or whether there was only one continuous taking. * * * The opening from the main to the pipe was never closed, and the taking was, therefore, in fact, continuous. This being so, there is no difficulty in the case; but even if it had not been so, the taking would have been continuous. Many instances might be given besides those already mentioned. (Reg. *v.* Bleasdale, 2 C. & K., 765, and Reg. *v.* Shepherd, L. R., 1 C. C., 118). Take the case of a granary at a railway station, and a man bringing two wagons close to the granary, and taking sacks from time to time, and extending this taking over four or five days. Here there would be different takings at different times, but it would be impossible to treat the taking otherwise than as one continuous act. On principle, therefore, and on authority, the conviction (in this case) was right, and the appeal must be dismissed.

11 Cox C. C., 234.

In Reg. *v.* Bleasdale, 2 Carr. & Kir., 765, the defendant was indicted for stealing coal from the mine of H. J. Gunning. The evidence showed that, from the shaft opened

to work his mine, the defendant had carried on extensive workings of coal by means of levels, drift-ways, tunnels, cuttings and drains, and thereby, during a period of more than four years, had continuously taken coal belonging to thirty or forty different proprietors, without their sanction or knowledge, and had thus unlawfully possessed himself of large quantities of valuable coal belonging to other persons. Upon these facts being shown, the defendant's counsel claimed that each separate severance and removal of coal was a separate and distinct felony, and asked that the prosecutor be required to elect upon which charge he would go to the jury; but the court held that the taking was one continuous transaction and refused to direct the prosecution to elect. In summing up, the court said:

> The remarkable part of this case is, the extent of the property taken; and it has been urged that the taking of each day was a separate felony, and that only one felony could be inquired into on this indictment. But I should say, that, as long as coal was gotten from one shaft it was one continuous taking, though the working was carried on by means of different levels and cuttings, and into the lands of different people.
>
> 11 Cox C. C., 239.

In Crepps *v.* Durden (2 Cowper, 640), the defendant, a baker, was charged with "exercising his ordinary trade upon the Lord's day," and was four times convicted of selling hot loaves of bread on the same day. It was contended that only one offence had been committed, and that the justice had exceeded his jurisdiction in imposing more than one penalty. The case was taken up, and Lord Mansfield in delivering the unanimous opinion of the court said:

> If the act of Parliament gives authority to levy but one penalty, there is an end of the question, for there is no penalty at common law. On the construction of the act of Parliament, the offence is "exercising his ordinary trade upon the Lord's day," and that without any fractions of a day, hours, or minutes. It is but one entire offence, whether longer or shorter in point of duration; so, whether it consist of one or a number of particular acts. The penalty incurred by this offence is five shillings. There is no idea conveyed by the act itself that, if a tailor sews on the Lord's day, every stitch he takes is a separate offence; or if a shoemaker or carpenter work for different customers at different times on the same Sunday, that those are so many separate and distinct offences. There can be

but one entire offence on one and the same day; and this is a much stronger case than that which has been alluded to, of killing more hares than one on the same day; killing a single hare is an offence, but the killing of ten more in the same day will not multiply the offence, or the penalty imposed by the statute for killing one. Here repeated offences are not the object which the legislature has in view in making the statute, but singly to punish a man for exercising his ordinary trade and calling on a Sunday. Upon this construction, the justice had no jurisdiction whatever in respect of the three last convictions.

If the reasoning of the eminent authorities cited be sound, and it is but one offence to attach a fraudulent pipe to a gas main, and, during several years, to use the gas flowing through it; or to feloniously take coal from a mine for a period of four years or more; or to apply a tube to a vat and subtract an indefinite quantity of wine from it, without regard to the length of time the suction lasts, or the amount of wine subtracted, so long as the tube remains—how much more patent it must be that a continuous cohabitation with more than one woman, no matter what the length of its duration may be, can constitute but a single offence. And, when we consider that, under the law as construed by the courts, this cohabitation must be accompanied by a claim of marriage, the analogy becomes still greater, and the force of reasoning more apparent in its application to this case, for the claim of marital relationship might be well compared in its legal effect, to the attachment of the pipe or tube, and the conduct of the defendant constituting the alleged cohabitation, with the act of burning the gas or subtracting the wine. If this be so, the analogy is perfect, and we find the cases cited to be directly in point.

But our own courts have not been slow to adopt the principles which have controlled the English courts in this class of cases. In the case of United States *v.* James McCormick (4 Cr. C. C., 104), on an indictment for keeping a public gaming-house, the court held that "*all the acts of gambling, and keeping a gaming-house, previous to the finding of the indictment, constituted but one offence.*"

In the case of State *v.* Lindley (14 Ind., 430), on an indictment for keeping a gaming-house, the court held that:

> All the time during which a given house is continuously thus kept, prior and up to the prosecution for the keeping, constitutes one indivisible offence, which can be punished but in a single prosecution. Like a civil cause of action, it cannot be split up in the prosecution of it. But one penalty can be assessed.

In the case of State *v.* Nutt (28 Vt., 598), the respondent was indicted for selling intoxicating liquor without license, during a period for which he had formerly been convicted of being a common seller. In its opinion the court said:

> If the Government see fit to go for the offence of being a "common seller," and the respondent is adjudged guilty, it must, in a certain sense, be considered as a *merger* of all the distinct acts of sale, up to the filing of the complaint, and the respondent cannot be punished but for one offence. * * * The jury should have been told that it was a conclusive bar as to all sales made prior to filing the complaint.

The case of Mayor of New York *v.* Ordrenan (12 Johns., 122), was an action to recover $3,000 penalties for keeping gunpowder in violation of a city ordinance, which provided that, if any person should keep a greater quantity of gunpowder, at one time, than twenty-eight pounds in any one place, such person should forfeit the powder so kept, and $125 for every hundredweight thereof. The court rendered judgment for the defendant, and said:

> In the third count, $1,375 are claimed for one single offence, and eleven forfeitures are insisted on, where there has been but one offence. There is no limit to the principle set up in the by-law. With the same propriety the penalty of $125 might have been imposed on every pound of gunpowder, or even on every grain kept contrary to the by-law. * * * * *The by-law is a plain and manifest excess of power in inflicting a penalty, and in applying it, not to the offence itself, but to the quantity of the offence.*

This language is very pertinent to the case at bar. The statute has prescribed a penalty for the offence of unlawful cohabitation. The court, including its prosecutor and grand jury, not being satisfied with imposing upon a defendant the full penalty of the law for his offence, by the process of seg-

regation seeks to apply the penalty "*not to the offence itself, but to the quantity of the offence.*" Can there be any possible doubt that this is a most flagrant usurpation of power and an arbitrary attempt to supplement the legislation of Congress by an illegal and oppressive cumulation of penalties? We think not.

In the case of Sturgis *et al. v.* Spofford (45 N. Y., 446) the plaintiffs recovered judgment against the defendant for forty-six penalties of $100 each, for employing a person not holding a license to act as pilot. The court of appeals reversed the judgment except as to $100, and, after quoting the statute, that "all persons employing a person to act as pilot, not holding a license under this act, or under the laws of the State of New Jersey, shall forfeit and pay to the 'board of commissioners of pilots' the sum of $100," said:

> The act is general in its terms. It is the employment of an unlicensed pilot, for which the penalty of $100 is incurred. It does not say for each employment, nor for each offence, nor for each ship unlawfully piloted. *Penal statutes are to be construed strictly*, and the language will justify the construction that but a single penalty is incurred for all of the alleged unlawful acts of the party prior to the commencement of the action.
>
> "All persons employing" are liable; whether the unlicensed person employed piloted one or fifty ships it is still but an employment (Washburn *v.* McIuroy, 7 J. R., 134; Tiffany *v.* Driggs, 13 J. R., 252). *Prosecutions for aggregated penalties should not be encouraged.* Penalties are often incurred inadvertently, or under a claim of right, and if the prosecution is promptly instituted for a single offence, it operates as a salutary warning to discontinue the practice or acts complained of, while delay may be regarded as an acquiescence in the right of the party to perform the acts. * * * *It is a wholesome rule not to allow a recovery for aggregated penalties, unless the language of the statute clearly requires it.* Under this rule the party prosecuted will have an opportunity to desist from doing the act complained of, and if he does not, he will knowingly incur all the hazards of repeated prosecutions.

The case of Fisher *v.* N. Y. C. and H. R. R.R. Co. (46 N. Y., 644), was an action to recover penalties alleged to have been incurred by defendant, under the law, in asking and receiving a greater rate of fare than the law allowed. The defendant insisted that but one penalty could be recovered in the action. The court said that the statute was

passed to remedy the illegal practice of extorting excessive fares, and that:

> To effectuate this intent, the language of the statute was chosen with care; which sum, etc., may be recovered, omitting the words "for each and every offence," found in various penal statutes. * * *
>
> But one penalty can be recovered upon the statute under consideration, for all acts committed prior to the commencement of the action. If after this it is again violated, another may be recovered in another action commenced thereafter, and so on as long as violations continue. This will not only tend at once to put a stop to the extortion when it is committed knowingly by the defendant, but where it is done under a mistake as to its rights, *will give it notice that its right to charge the amount claimed is challenged*, and will induce a cautious examination of the question, and an abandonment of the claim before a ruinous amount of penalties have been incurred.

See four like cases reported in 49 N. Y., 654.

If it be necessary that the Government should give a defendant notice, by commencing suit in each case, where the penalty is only $50, how much more imperative must be the rule in a case like this, where the penalty imposed may be both fine and imprisonment, and where the delay might cause the defendant not only to incur "a ruinous amount of penalties," in fines, but even to subject himself to imprisonment for a long term of years, or possibly for life.

The Supreme Court of North Carolina, in the case of State *v.* Commissioners (2d Murphey, 371), denounced this kind of procedure in the following emphatic terms:

> Were such a doctrine tolerated, it is impossible to say where its consequences would end. * * * This notion of rendering crimes, like matter infinitely divisible, is repugnant to the spirit and policy of the law, and ought not to be countenanced.

In the case of State *v.* Egglesht (41 Iowa, 574), the court expresses, in unmistakable terms, the true principle governing this case. There, the defendant on the same day, had presented to the Davenport National Bank four forged orders or checks, for which he received credit on the books of the bank. He was indicted for uttering each check, and, having been convicted on one indictment, interposed a plea of former conviction in the second case, which was over-

ruled by the trial court. The appellate court reversed the judgment, and, in rendering the opinion, said:

> Whether certain criminal acts constitute one crime or more, must depend upon the nature and circumstances of the acts themselves. When the defendant uttered, at the Davenport National Bank, four forged checks, the character of his act became fixed. He either committed one crime, or he committed four. *It is not competent for the State, at its election, by the form of the indictment, to give to defendant's act the quality of one crime or of four, at pleasure.* The act partakes wholly of the one character or wholly of the other.

The authorities cited, with the cases referred to by them, and others of like import, would seem, upon principle and precedent, conclusively to settle the segregation question in favor of the petitioner, were it not that in one single case, Commonwealth *v.* Connors (116 Mass., 35), the Supreme Court of Massachusetts has seemed to hold otherwise. Upon this decision the prosecutor relied in the trial court, and upon its authority alone the Supreme Court of Utah affirmed the decision of the district court upon this point. Mr. Justice Boreman in delivering the opinion of the Supreme Court of Utah (9 Pacific Reporter, 696), referred to the Connors' case in the following language:

> This last case appears to be directly in point, and we are of opinion that it supports the ruling of the lower court in the present case on the point under discussion. *It is the only case we have seen which squarely meets the issue, and it sustains the ruling of the court below in the case at bar.* Coming as it does from the very able and highest court in one of the oldest commonwealths of our Union, it commands respect and consideration and we have no hesitancy in following it. We therefore find that the court below, in the present case under consideration, committed no error in sustaining the demurrer to the plea of former conviction interposed by the appellant.

While we most heartily concur with Mr. Justice Boreman in thinking that a decision of the Supreme Court of Massachusetts should *always* "command respect and consideration," we have no hesitancy in saying that the Supreme Court of Utah must have misapprehended the real import of that decision when they declared that it "sustains

the ruling of the court below in the case at bar." In that case two indictments had been found against the defendant, by the same grand jury, for keeping a tenement for the illegal sale of liquors, and under a doctrine peculiar to that State the court held that, as the indictments covered two distinct periods of time, and as the "evidence that would have been competent on the one indictment would not have been competent on the other, and *the same evidence could not convict in both cases*," both indictments might stand. This rule of law that, "where the offence consists of a series of acts which, taken together, constitute a criminal practice or occupation, time enters into the essence of the offence, and hence, it must be alleged with certainty, and the evidence confined to acts done within the time charged," does not prevail elsewhere than in Massachusetts. In Utah the evidence need not be confined to the period named in the indictment (U. S. *v.* Cannon, 7 Pac. Rep., 379). The rule there permitted the prosecution to introduce, on each trial, all the evidence of a continuous cohabitation during the entire time charged in the three indictments. This extreme injustice could not possibly have happened under the Massachusetts rule, for as the court said in Commonwealth *v.* Robinson (126 Mass., 261), where this very case of Connors' was approved, "when a person is charged with an offence continuous in its nature, and requiring for its commission a series of acts, and such offence is alleged to have been committed upon a single day, evidence of any facts tending to establish the offence at any other time than upon the day named is inadmissible." Mr. Bishop, in speaking of this doctrine, says "it does not accord with the rules which are followed elsewhere;" and Mr. Wharton says it "cannot be reconciled with the reasoning" of other courts and legists. Still, being the accepted doctrine there, and the very principle upon which the court based its decision in

the Connors' case, it must be considered in determining the authority of that case, and to eliminate from it that essential element would be not only unfair and unjust, but illegal and inadmissible. In other words, the Utah courts could not tear away the very foundation upon which the Massachusetts rule rested, and then claim the existence of the rule in all its force and vitality. Yet, this is precisely what was done in these cases.

Though the defendant invoked the Massachusetts rule that "the same evidence could not convict in both cases," neither the ability of that eminent court, nor the grandeur of the old commonwealth could "command sufficient respect and consideration" to induce the court to adopt the rule and confine the evidence in each case to the period charged in the indictment. But when, by his plea of former conviction, he claimed to be entitled to have the other prosecutions dismissed, the court became suddenly inspired with such "respect and consideration" for the able court, whose rule it had just ignored, that it had "no hesitancy in following it," although such following would lead to a triple conviction and the infliction of three penalties for a single offence.

It seems evident from the foregoing that the Utah courts must have misapprehended the law as laid down in the Connors case, and have misapplied it to the case at bar. So clearly does this appear that we might safely rest upon the distinction already drawn, were it not that some stress has been laid by the prosecution in the lower courts upon an *obiter* expression of the Supreme Court of Massachusetts made with reference to the Connors case, in Commonwealth *v.* Robinson (126 Mass., 264), in the following language: "Because there was no single day common to both indictments, it was held that two distinct offences were charged; thus illustrating *the very large discretion vested in the grand*

jury in limiting the time within which a series of acts may be alleged as constituting a single offence." What did the court mean by the words which we have italicised? Did they mean that it was competent for a grand jury to divide up a single continuous offence into as many different parts as their "discretion" might suggest, and then call each part a separate and distinct offence? That such was not the meaning of the court is evident from the following language, used by it in the very same decision, on page 261:

> The offence charged in this complaint is that of keeping a tenement for the illegal sale of intoxicating liquors between the first day of January and the twentieth day of August, 1878. *If the defendant thus kept the tenement during every hour of the time between those dates, he has committed but one offence.* It is true that such offence is continuous in its character. It is not an offence committed by a single sale of intoxicating liquors, but it is that of maintaining a common resort for the purchase of intoxicating liquors which the legislature has deemed it proper to declare a common nuisance.

From this very authority it is apparent, then, that even under the Massachusetts rule, the petitioner having continuously cohabited "during every hour of the time" between January 1st, 1883, and December 1st, 1885, "committed but one offence." The discretion, then, which the court had in view as being exercised by the grand jury, was not to segregate a single continuous offence into separate and distinct offences, but to determine the period of time within which an offence should be charged. As, for example: The statute of limitations in such cases being three years, the grand jury which found these three indictments had the discretion to charge the offence as a continuous one, covering the entire period of three years next preceding the finding of the indictment, or to limit the time within which the offence was charged to one year, or to any other period less than that limited by law, but they had no discretion or power to charge more than one offence committed during the whole or any part of that period. A

careful examination of the case will show conclusively that the court could have meant nothing more nor less than what we have stated, and in that view of the case it is in perfect harmony with the well settled principles of law applicable to such cases.

To assume that the court meant any other or greater discretion than that suggested, would be to attribute to it the absurdity and folly of declaring that the grand jury might in its discretion exercise legislative powers. Because, if it can, by a multiplicity of indictments, increase the number of offences, it can thereby, in effect, increase and multiply the penalty prescribed by the statute, and thus change the law in its most vital part. Such power can never be conceded to exist in a grand jury. It would be in excess of the legislative power possessed by Congress itself, and would even legalize *ex post facto* enactments, for the jury could, upon such a theory, investigate what had been a person's conduct during a period of past time and, in their discretion, determine the amount and extent of punishment he should suffer for acts already committed, by the number of indictments presented against him. Such *ex post facto* legislation has been too strongly interdicted in this country to leave room for apprehension that the function of a grand jury can reach to such an alarming extent. The question of whether certain conduct constitutes one offence or more is solely a question of law, and one over which the grand jury can exercise no discretion whatever. The Supreme Court of Iowa enunciated an important truth when it said:

> It is not competent for the State at its election, by the form of its indictment, to give to defendant's act the quality of one crime or of four at pleasure. The act partakes wholly of the one character or wholly of the other.

When we consider the point as it has arisen in this case, we see at once how utterly preposterous and unjust the theory of the prosecution is. Here the defendant was per-

mitted, without any interference on the part of the Government, to keep up a continuous cohabitation for nearly three years; and then he was indicted and convicted for three offences, and sentenced to 18 months' imprisonment and to pay a fine of $900, when the law under which he was prosecuted fixed the maximum penalty for such an offence at six months' imprisonment and $300 fine. That the division of time is arbitrary, and that there is no logical limit to the precedent when once established, is palpable. If three indictments can legally be found in a case where the offence is manifestly, and according to all reasonable construction, but a single one, the same reasoning or ruling will justify the finding of thirty or three hundred indictments. Neither legal justice nor the plea of necessity, much less the broader equity found in humane sentiment, would dream of justifying or excusing a rule which would permit the prosecution to sit idly by and witness the continued violation of a law, for an indefinite period, without any effort to correct the evil, and then literally pounce upon the offender when he rests in the security which ignorance of the offence gives, or which may have been imbibed from the tacit encouragement given by the absence of legal rebuke, and, by piling up countless indictments, render him liable to imprisonment for life, as well as to financial ruin from limitless fines. Such boundless powers of punishment were never thought of before, and the tendency of such a vicious principle can readily be seen. There is no controverting the logic which emphatically declares that, if a man may be prosecuted for each year he may also be prosecuted for each month, or week, or day, in the three years of limitation; and why not for each hour? What is there to prevent it? If indicted for each month the imprisonment would aggregate 18 years and the fines would amount to $10,800; while an indictment for each week would entail an imprisonment of 78 years and fines

amounting to $46,800. When the calculation is extended into days the result is simply appalling, showing an imprisonment of 547 years and fines amounting to $328,500.

Congress never could have intended to authorize, and this Court will not sanction, the perpetration of such an inhuman outrage in the name of justice.

GEORGE TICKNOR CURTIS,
FRANKLIN S. RICHARDS,
Counsel for Petitioner.

120-274

Supreme Court of the United States.

OCTOBER TERM, 1886.

EX PARTE: IN THE MATTER OF LORENZO SNOW, PETITIONER, APPELLANT. } No. 1282.

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, TERRITORY OF UTAH.

Supreme Court of the United States.

OCTOBER TERM, 1886.

EX PARTE: IN THE MATTER OF LORENZO SNOW, PETITIONER, APPELLANT. } No. 1282.

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, TERRITORY OF UTAH.

Brief for the United States.

This is an appeal from the judgment of the district court of the third judicial district of Utah denying the application of the appellant for the writ of habeas corpus on the ground that from his own showing he was not entitled to a discharge. (R., pp. 1 and 19.)

The appellant was indicted and convicted of three offenses under section 3 of the act of the

22d March, 1882 (22 Stat., pp. 30–32), which provides—

> SEC. 3. That if any male person, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court.

The unlawful cohabitation was laid in each indictment to have been with the same women, but each indictment embraced a different period of time; one being for the year 1883, one for the year 1884, and the remaining one for the first eleven months of 1885.

The indictment for 1885 was tried first.

The indictment for 1884, which was next tried, was met by a plea in bar of a former conviction for the same offense, meaning the conviction under the indictment for 1885.

The indictment for 1883, which was next tried, was met by a plea in bar of two former convic-

tions for the same offense, meaning the convictions under the two indictments for 1885 and 1884

The pleas of *autrefois convict* were demurred to by the prosecution, and the demurrers were sustained, and the three convictions were obtained on the pleas of not guilty.

The prisoner was sentenced in each case to six months' imprisonment in the penitentiary and to pay a fine of $300, with costs, and to stand committed until the fine and costs should be paid in full.

The aforegoing facts appear by transcripts of the records in the three cases, which are exhibits of the Petition.

It appears by the petition that the appellant has served out the first sentence and paid in full the fine and costs thereby adjudged against him, and he claims that there is no warrant of law for detaining him under the judgments in the other two cases, for that the court had no jurisdiction to render judgment against him in more than one of the three cases, the same offence being

charged in each case, and hence that he is being punished twice for one and the same offence.

The court in which the three indictments were tried, the district court of the first judicial district of Utah, is vested with the same jurisdiction in all cases arising under the Constitution and laws of the United States as the circuit and district courts of the United States (R. S, § 1910).

It is not pretended that the court that tried these cases had not jurisdiction of the offense of cohabiting with more than woman.

The whole contention is that the judgments in the second and third cases were void because the indictments in those cases charged the same identical offense as was charged in the first case.

But if the court had jurisdiction over the offense it had also jurisdiction to decide the question of the identity of the offenses charged in the three cases which was raised by the plea of *autrefois convict* in the second and third cases.

Jurisdiction of an offense necessarily carries with it the power to try and determine every

matter that may be urged in bar of an indictment charging such offense. There can be no room for doubt or hesitation as to the soundness of this proposition, which has been repeatedly recognized by this court in several cases which are absolutely conclusive of the case at bar.

The case of *Ex parte* Bigelow (113 U. S, 328) is identical with this case. Bigelow was indicted and convicted in the supreme court of this District for embezzlement. He came before this court for a writ of *habeas corpus*, claiming a discharge from imprisonment on the ground that after having been put on his trial under fourteen indictments, which had been consolidated and ordered to be tried together, the court decided that the indictments could not be tried together, discharged the jury from further consideration of them, rescinded the order of consolidation, and then tried the prisoner before the same jury on one of the indictments. All this was in the face of the prisoner's objections, and, as he contended before this court, was in violation of the constitutional guaranty that no person shall "be sub-

ject, for the same offense, to be twice put in jeopardy of life or limb." But what said this court without a dissenting voice?

It is said, however, that the court below exceeded its jurisdiction, and that this court has the power, in such case and for that reason, to discharge the prisoner from confinement under a void sentence. The proposition itself is sound if the facts justify the conclusion that the court of the district was without authority in the matter.

But that court had jurisdiction of the offense described in the indictment on which the prisoner was tried. It had jurisdiction of the prisoner, who was properly brought before the court. It had jurisdiction to hear the charge and the evidence against the prisoner. It had jurisdiction to hear and to decide upon the defenses offered by him. The matter now presented was one of those defenses. Whether it was a sufficient defense was a matter of law on which that court must pass so far as it was purely a question of law, and on which the jury under the instructions of the court must pass if we can suppose any of the facts were such as required submission to the jury.

If the question had been one of former acquittal—a much stronger case than this—the court would

have had jurisdiction to decide upon the record whether there had been a former acquittal for the same offense, and if the identity of the offense were in dispute it might be necessary on such a plea to submit that question to the jury on the issue raised by the plea.

The same principle would apply to a plea of a former conviction. Clearly, in these cases the court not only has jurisdiction to try and decide the question raised, but it is its imperative duty to do so. If the court makes a mistake on such trial it is error which may be corrected by the usual modes of correcting such errors; but that the court had jurisdiction to decide upon the matter raised by the plea both as matter of law and of fact cannot be doubted.

Now, it is a little remarkable that no attempt has been made to distinguish that case from the one in hand. So far from it, that case is not even referred to in the opposite brief.

In *Ex parte* Parks (93 U. S., 18) the ground of the application was that the matter for which the petitioner was undergoing sentence was not an offense under the bankrupt act as charged in the indictment, and, therefore, that the court had acted without jurisdiction.

But this court held, in denying the writ, that the question whether the imputed criminal act was an offense or not, within the meaning of the bankrupt law, was a question which the district court had jurisdiction to determine, saying:

> But the question whether it was or was not a crime within the statute was one which the district court was competent to decide. It was before the court and within its jurisdiction. No other court, except the circuit court for the same district, having concurrent jurisdiction, was as competent to decide the question as the district court.
>
> Whether an act charged in an indictment is or is not a crime by the law which the court administers (in this case the statute law of the United States) is a question which has to be met at almost every stage of criminal proceedings—on motions to quash the indictment, on demurrers, on motions to arrest judgment, &c. The court may err, but it has jurisdiction of the question. If it errs, there is no remedy after final judgment unless a writ of error lies to some superior court, and no such writ lies in this case. It would be an assumption of authority for this court, by means of the writ of *habeas corpus*, to review every case in which the defendant attempts to controvert the criminality of the offense charged in the indictment.

The same law is laid down in *Ex parte* Watkins (3 Pet., 193, 202), *Ex parte* Yarborough (110 U. S., 651, 653), *Ex parte* Crouch (112 U. S., 178), *Ex parte* Royall (112 U. S., 181), *Ex parte* Gordon (104 U. S., 516), and Smith *v.* Whitney (116 U. S. 167). In this last cited case the attempt was to make the writ of prohibition do the office of a writ of error, as in the other cited cases it had been to make the writ of *habeas corpus* perform that function.

The case at bar is but a repetition of these abortive efforts to induce this court on *habeas corpus* to look into the validity of judgments of other courts of competent jurisdiction, which are only voidable and reviewable on writ of error, if voidable and reviewable at all.

The appellant made the endeavor to bring all three of his cases before this court by writ of error, but failed (Snow *v.* U. S., 118 U. S., 346); his present attempt is to do *per indirectum* what he could not do *per directum*. This the law will not allow.

As the decisions referred to would make it a waste of time to follow the discussion of counsel opposite upon the point whether the prisoner's illegal cohabitation in 1883, 1884, and 1885 was one offense and allowed of one indictment only, I shall therefore pass on to the only remaining point.

It is said that the sentences in the second and third cases are void because the *terminus a quo* of each sentence involves too much uncertainty to be permitted in a valid judgment.

It seems that by a Territorial law, which is set out in the appellant's brief (pp 18, 19), a prisoner may, by good conduct, become entitled to an abatement of the time of his sentence, and it is supposed that a difficulty grows out of the second sentence being to begin from the expiration of the first and the third sentence from the expiration of the second. In other words, the argument is that if a person is convicted, at the same term, of three offenses, punishable by imprisonment, there is no way, without risk of doing some injustice, by which he can be sentenced for more than one, because the court cannot desig-

nate fairly and with the requisite certainty the time when the sentences for the other offenses shall go into effect.

We submit that this is spinning rather too fine, and that when the court said that the second sentence should begin "at the expiration of the sentence and judgment rendered" in the first case, and that the third sentence should begin "at the expiration of the sentence and judgment" in the second case, it employed due certainty and all the certainty that was attainable without creating intervals between the sentences, and so prolonging the prisoner's incarceration.

It was not necessary to express in the sentences what the law annexed to them as a necessary condition.

It might with just as much reason be said, it seems to us, that the second sentence was void because the President might have pardoned Snow, the appellant, for the first offense; or that the third sentence was void because he might have been pardoned for the second offense.

It is not contended that the sentences might not have been properly tacked, as the cases cited would seem to indicate, but if it were so contended it could not be maintained (Whart., Cr. Pl. & Pr., § 910).

This point was not made in the argument supporting the writs of error sued out by the now appellant and dismissed at the last term of this court.

It is submitted that no case is presented for issuing the writ of *habeas corpus*.

WM. A. MAURY,
Assistant Attorney-General.